



ZUCKERMAN SPAEDER LLP

201 SOUTH BISCAYNE BOULEVARD SUITE 900
MIAMI, FL 33131-4326
305.358 5000 305.579.9749 fax www.zuckerman.com

MICHAEL S. PASANO
MPASANO@ZUCKERMAN.COM

October 22, 2003

Rhonda L. Vosdingh
Associate General Counsel
Enforcement
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463-0001

Attn: April J. Sands, Esq.
Office of General Counsel

2003 OCT 23 P 1:33

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: MUR 5357/Centex Corporation (D.J. McGlothern)

Dear Ms. Sands:

This submission is in response to the complaint Centex Corporation has filed with the Federal Election commission ("FEC") regarding possible violations of Title 2 U.S.C. Section 441(f), and the Federal Election Campaign Act of 1971 as amended (the "Act"), at a Centex subsidiary called Centex-Rooney Construction Company Inc. ("Rooney"), and the correspondence from the FEC dated September 24, 2003, advising that the FEC has found reason to believe violations of Section 441(f) have occurred.

D.J. McGlothern was formerly employed by Rooney during the time period addressed in the company's complaint to the FEC.¹ Mr. McGlothern first received notice from the FEC that he was implicated by Centex's complaint and subject to legal findings when he received the September 24, 2003 correspondence. Accordingly, this correspondence is Mr. McGlothern's first opportunity to be heard, and first submission to the FEC, in connection with this matter. Also submitted in support of this response is a sworn affidavit of Mr. McGlothern. For the reasons set forth below, we urge that the Commission conclude that no action should be taken against Mr. McGlothern on the basis of the instant complaint.

Introduction

D.J. McGlothern completed two years of higher education at Texas A & M, and suspended his studies to enter the construction industry. He worked initially as a laborer and carpenter, then as a site supervisor, next as a project manager, and was elevated to

¹ Mr. McGlothern will separate from employment with Rooney in or about October 2003.

9203-904-40-23



October 22, 2003

Page 2

senior manager. He has worked with various Centex-related companies since December 1, 1985.² He was promoted to Vice President and Business Unit Leader, Tampa Operations, Rooney, in or about December 2001. Prior to December 2001, Mr. McGlothern was Vice President – Operations- Criminal Justice Division, for five years. During the time period 1999, Mr. McGlothern reported to Ted Adams.

Mr. McGlothern has been married for ten years and has two children and two step-children. He is active in his community, including *inter alia* the 4-H Youth Organization, the South Florida Fair, the Cattleman's Association, the Hernando County, Florida Education Foundation, the American Correctional Association, the American Jail Association, and the Florida Sheriff's Association.

The Complaint/Background

In January 2003, the CEO of Centex directed its General Counsel to undertake an investigation into whether or not employees of Rooney may have been reimbursed with corporate funds for individual political contributions. Thereafter Centex retained the law firm of Arnold & Porter to assist in this investigation. The instant complaint contains the results of the Arnold & Porter investigation.

Rooney is a long-standing construction company with an excellent reputation which operates in and outside of the State of Florida. Bob Moss joined Rooney in 1986 as Chairman, President and CEO. In 2000, Mr. Moss was promoted to the position of Chairman and CEO of Centex Construction Group. Mr. Moss remained as Chairman at Rooney. Gary Esporin joined Rooney around the same time as Mr. Moss and served as CFO of Rooney. Mr. Esporin was promoted in 2000 to co-CFO of Centex Construction Group but retained his position at Rooney. Mr. Esporin reported directly to Mr. Moss.

Rooney employees participated in several incentive compensation plans that paid bonuses to employees. A percentage of the bonus pool was reserved for discretionary bonuses. Mr. Moss and Mr. Esporin handled the bonus process. Mr. Moss reviewed and set the discretionary bonuses for the Rooney employees.

Rooney employees were encouraged to be active in their community affairs, including attending and participating in political fund-raisers, and making political and charitable contributions as part of Rooney's emphasis on relation-building and marketing. Mr. Moss and Mr. Esporin asked employees to keep them informed about these kinds of

² Mr. McGlothern left Rooney for approximately ten months in 1991 to accept employment with another construction company.

2003-10-22 10:40:33



October 22, 2003

Page 3

activities, including reporting the amounts of political contributions and to whom they were made.

It turns out that Mr. Esporin kept track of contributions and calculated amounts that would reimburse employees for contributions, "grossing up" the amounts to offset tax liability. These calculations were set out on spread sheets Mr. Esporin maintained and apparently used when employee annual bonuses were determined. Centex and Arnold & Porter have concluded that contained within the large discretionary incentive compensation bonuses which some Rooney employees received were amounts that reimbursed for contributions made. The bonus checks did not show that this had occurred. Moreover, the Esporin spreadsheets were not shared with Rooney employees.

The complaint indicates that D.J. McGlothern made two (2) political contributions for which he was reimbursed by another Rooney employee: \$500 to Corrine Brown for Congress on October 15, 1999; \$500 to Bush for President on November 04, 1999.

The complaint does not say that Mr. McGlothern was directed to make political contributions to these candidates by Rooney or any person. He was not. The complaint does not say that Mr. McGlothern was informed that he would be reimbursed for political contributions. He was not. The complaint does not say that Mr. McGlothern requested reimbursement for the making of these contributions. He did not. The complaint does not say that Mr. McGlothern was consulted at any time about the propriety of making or receiving reimbursements. He was not.

Centex/Rooney

Centex and Rooney are highly regarded companies with no history of improper behavior. The companies maintain high ethical standards and have clear policies that business is conducted in accordance with both the letter and the spirit of all applicable laws. Rooney employees tend to stay at the company. Its executive officers have all been with Rooney for many years. D.J. McGlothern was a dedicated employee committed to doing his job in an appropriate and professional manner and who remains proud of his accomplishments while employed by Rooney. Mr. McGlothern was not a Rooney executive officer and was not a participant in any discretionary executive bonuses.

Relevant Law

Pursuant to Section 441f of Title 2 of the Act, "no person shall make a contribution in the name of another or knowingly permit his name to be used to effect such a contribution..." Commission regulations made explicit that the prohibitions of Section 441f

23.04.406.3028



October 22, 2003

Page 4

apply to individuals who help or assist in the making of contributions in the name of another. 11 C.F.R. § 110.4(b).

Pursuant to 2 U.S.C. § 441b, a corporation may not make a contribution in connection with the election of a candidate for federal office.

In determining if and how to proceed with possible violations of the Act, the Commission looks at whether any violations in fact occurred and whether the violations of law are knowing and willful. When Congress amended the Act in 1976 to centralize the criminal penalties for violations of the Act, it was concerned about the complexity and technical nature of the statute and the potential that non-culpable people could be caught up in apparent violations of law. See 122 Cong. Rec 8577 (March 30, 1976 statement of Representative Rostenkowski). During the House debates on the Conference Report for the 1976 Amendments, Congressman Hays stated that the phrase "knowing and willful" referred to "actions taken with full knowledge of all of the facts and a recognition that the action is prohibited by law." 122 Cong. Rec H 3778 (May 3, 1976 remarks of Congress Hays).

This strict and liability-limiting notion of what constitutes knowing and willful acts has been adopted by the Courts. See e.g., Federal Election Commission v. Friends of Jane Harman, 59 F. Supp 2d 1046 (C.D. Calif. 1999); Federal Election Commission v. John A. Dramesi for Congress Committee, 640 F. Supp 985 (D.N.J. 1986).

Pertinent Facts

D.J. McGlothern regularly contributes to political campaigns. In fact, Mr. McGlothern has made many political contributions for which he was not reimbursed. In 1999, he made two \$500 contributions to congressional and presidential candidates, totaling \$1,000.00. He made these contributions because he supported and believed in these candidates. No one promised him he would be reimbursed for making these contributions and he did not write checks expecting to be reimbursed.

Mr. McGlothern was aware Rooney kept track of contributions its employees made. He viewed this fact as normal and proper. He provided information about his contributions to Ted Adams, his immediate supervisor at the time. In doing so, Mr. McGlothern did not expect or understand that this information would be used to reimburse him. Further, he did not know that the information would be passed on to any other person, and did not ask Ted Adams to provide the information to anyone for any purpose. Mr. McGlothern was surprised when he received a check from Gary Glenewinkel for \$1,000.00 and had no knowledge regarding whether Mr. Glenewinkel was reimbursed for the monies.

23.04.406.3029



October 22, 2003

Page 5

Mr. McGlothern was not involved in discussions regarding the setting of discretionary bonuses for Rooney employees or the consideration, implementation, review or approval of reimbursement for political contributions.

Analysis

The Commission is well familiar with cases involving allegations of companies reimbursing employees and third parties for political contributions. In determining what action to take, the Commission typically looks at evidence whether the "conduit employees" knew they were being reimbursed; knew their actions were illegal; and/or participated in acts of additional complicity. Cases where the Commission has taken action against the "conduit employees" have typically involved matters where there was clear evidence of knowledge and complicity. See e.g. MUR 2893 (Westwood One); and MUR 3508 (New Enterprise Stone and Lime Co.). Many such cases include evidence of falsification of company records in which employees played a part. In other cases, where there was no evidence of additional complicity by the "conduit employees", the Commission has elected to take no action, albeit sometimes issuing letters of admonishment. See e.g. MUR 4286 (General Cigar Co.); MUR 4884 (Future Tech Int'l); and MUR 5187 (Mattel Inc.).

Here, there is no evidence D.J. McGlothern ever knew that he would be reimbursed for political contributions, let alone that he thought he was doing anything improper. There is certainly no evidence D.J. McGlothern did anything to further the "reimbursement scheme". Mr. McGlothern made a total of two (2) federal contributions over a three year period totaling \$1,000. He tendered information about these contributions to his boss only because he thought it perfectly legitimate and understandable that the company would want to keep track of candidates to whose campaigns its employees were making contributions. It never occurred to Mr. McGlothern that anything untoward was being done with this information, or that he should question his boss, in whom he had full faith and trust, about this. D.J. McGlothern never thought he was doing anything even remotely inappropriate. He made federal political contributions because he believed in the candidacy of the persons to whose campaigns he contributed. The contributions were his and not made on behalf of any other person. He certainly never acted knowingly or willfully.

Conclusion

D.J. McGlothern was at worst unwittingly involved in this matter. Mr. McGlothern's conduct was neither knowing or willful and he maintains that he committed no violation of the Act. We respectfully disagree with the finding of "reason to believe." We urge, consistent with past FEC practices in similar cases with regard to people similarly situated to Mr. McGlothern, that the FEC decide to take no further action as to Mr. McGlothern, and

0303 904 40 33

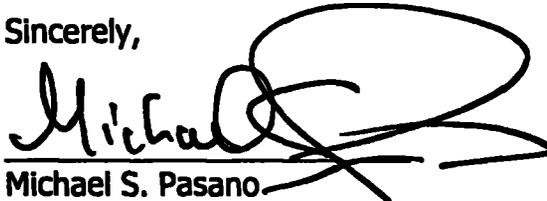
October 22, 2003
Page 6

that the FEC close this matter by reaching settlement and entering into pre-probable cause conciliation agreements with Centex-Rooney Construction Co. Inc. and Centex Construction Group Inc.

Mr. McGlothern nevertheless accepts the FEC's offer to participate in negotiations and authorizes you to send to us a proposed pre-probable cause conciliation agreement. By agreeing to engage in this process, Mr. McGlothern reserves his right to submit in the future appropriate factual and legal materials relevant to the FEC's further consideration of this matter, and does not mean to suggest that he will consent to conciliation. He simply wants to move this process along.

If you have any questions, or require further information, please do not hesitate to contact us at 305-579-0110.

Sincerely,



Michael S. Pasano
Paul A. Calli

Counsel to D.J. McGlothern

Enclosure

cc: D.J. McGlothern

23.04.40.33

SWORN STATEMENT

I, DJ McGlothern, being duly sworn, state and aver as follows.

1. My name is DJ McGlothern.

2. I was a Vice President at Centex Rooney Construction Company. Specifically, I was Vice President and Business Unit Leader – Tampa Operations, Rooney. I worked at Centex commencing in December 1985, I left the company for a brief time to pursue other employment in the early 1990s, and have been employed by the company since 1993. I was recently terminated from Centex.

3. In or about October 1999, I made a \$500.00 campaign contribution to the federal election campaign of Bush for President and a \$500.00 campaign contribution to the federal election campaign of Corrine Brown. No person requested that I make these contributions. I made these contributions because I believed in the candidates to whom I made the contributions. I made these contributions directly to the aforementioned campaigns, and did not forward them through Centex. No person told me that I would be reimbursed by Centex or its employees for these contributions. In making these contributions, I did not believe that I was doing anything improper.

4. In addition to the aforementioned campaign contributions, I made other contributions to local, state and federal political campaigns. At no time was I directed to make political contributions. At no time was I informed that I would be reimbursed for political contributions. In fact, I have not been reimbursed for many political contributions that I have made.

2303.904.40.32

5. During October 1999, I reported to Ted Adams, Senior Vice President and Criminal Justice Division Manager, Rooney. As part of my effort to ensure that that Mr. Adams was aware of my involvement in community affairs, including local, state and federal political campaigns, I submitted to him information regarding the above-noted campaign contributions. I did not ask Mr. Adams to forward the documentation that I submitted to him to any person and I did not ask anyone to submit this expense for reimbursement, and did not expect this to happen. I did not know that Mr. Adams apparently submitted a copy of these documents to Gary Glenewinkel, Executive Vice President and COO – South Florida Operations for Rooney, for reimbursement.

6. In April 2000, I received from Gary Glenewinkel \$1000.00 for the campaign contributions described above. This was a surprise to me. I have no personal knowledge that Gary Glenewinkel was reimbursed for these monies.

7. I have no knowledge regarding a "discretionary management bonus" program and did not participate in the formulation of same, nor did I receive a bonus under any such program, of which I am aware.

8. I have been advised that the Company retained counsel and notified the Federal Election Commission of potential violations of the Federal Election laws. I have never knowingly or willingly been party to any violation of law.

23 04 406 303

FURTHER AFFIANT SAYETH NOT

DJ McGlothern
DJ MCGLOTHERN

STATE OF FLORIDA)

COUNTY OF Hernando)

The foregoing instrument was acknowledged before me this 16th day of October, 2003 by DJ McGlothern, who is personally known to me or who has produced PLDL M243-170-54-458-0 as identification and who did take an oath.

Sandra J. Polleg
Notary Public, at Large
State of Florida

SANDRA J. POLLEG
Print Name

Commission Seal:



Sandra J Polleg
My Commission DD220878
Expires July 08, 2007

23 04 2006 3034